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In The

Supreme Court of the United States

OCTOBER TERM, 1986

NEW YORK,

Petitioner,

vs.

P. J. VIDEO, INC. d/b/a Network Video and James Erhardt,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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(13185)

QUESTION PRESENTED

1. Where this Court ordered that the present cause be remanded to the New York Court of Appeals for proceedings not inconsistent with the opinion in *New York v. P.J. Video,* ____US____, 106 S.Ct. 1610, and where that court misconstrued, mischaracterized and misinterpreted such opinion in coming to a contrary conclusion on remand, was the mandate issued by this Court in *P.J. Video* complied with by the Court of Appeals?

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OPINION BELOW

On November 21, 1983, a search warrant was issued by a justice of the New York Supreme Court, Erie County, authorizing the search of the premises known as Network Video, and the seizure of ten specifically named video cassette movies. As a result of said seizure, the defendant was charged on November 21, 1983 with five counts of Obscenity in the Third Degree, a class A misdemeanor, pursuant to New York Penal Law §235.05.

A motion to suppress the evidence was brought before the Village Court of Depew by the defendant on January 30, 1984. Following oral argument, the motion to suppress was granted and the charges against the defendant dismissed.

The People appealed this decision to the Erie County Court which on October 3, 1984 affirmed the suppression order below (LaMendola, J.). On November 27, 1984, an Associate Justice of the New York Court of Appeals granted leave to appeal this case to that court. In an opinion reported at 65 N.Y.2d 566 the Court of Appeals with one judge dissenting affirmed the decision of the court below.

The People petitioned this Court for a Writ of Certiorari to the New York Court of Appeals. The petition was granted on October 21, 1985 and the case was argued before this Court on March 4, 1986. On April 22, 1986 the Court reversed the decision of the Court of Appeals and remanded the issue for further proceedings in accord with its decision (____U.S.____, 106 S.Ct. 1610).

On remand, the New York Court of Appeals misconstrued the decision of this Court in *P.J. Video*. Finding *inter alia* that the Supreme Court diminished the role of the magistrate in the warrant process, the Court of Appeals looked to the New York Constitution to affirm the suppression order of the court of first instance.

JURISDICTION OF THIS COURT

On April 22, 1986 this Court reversed the state court decision in the case at bar and remanded the cause to the New York Court of Appeals for further proceedings consistent with its opinion. On reconsideration the New York court misconstrued this Court's holding and as a result, in an opinion issued on October 28, 1986, invalidated the search warrant at issue pursuant to Article I, Section 12 of the New York State Constitution. This improper construction is repugnant to the First and Fourth Amendments of the Federal Constitution. The jurisdiction of this Court is thus invoked under U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

AMENDMENT IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

NEW YORK STATE PENAL LAW

§235.00 Obscenity; definitions of terms.

1. "Obscene." Any material or performance is "obscene" if (a) the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex, and (b) it depicts or describes in a patently offensive manner, actual or simulated:

sexual intercourse, sodomy, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals, and (c) considered as a whole, it lacks serious literary, artistic, political, and scientific value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.

STATEMENT OF THE CASE

On its first review of the case at bar, the New York Court of Appeals determined that a search warrant authorizing the seizure of books or films must satisfy a "higher standard" of review under the Fourth Amendment than a warrant for materials not presumptively protected by the First Amendment. Applying this elevated standard to the warrant at issue, the court found that the affidavits underlying said warrant were insufficient to support the evidentiary seizure under scrutiny.

This Court, on writ of certiorari, concluded that a warrant authorizing the seizure of books or films "should be evaluated under the same standard of probable cause used to review warrant application generally." Further, this Court in evaluating the affidavits themselves held that the issuing justice had been given more than enough information to conclude that there was a "fair probability" that the movies satisfied all three prongs of the New York Penal Law definition of obscenity.

On remand the Court of Appeals proceeded on the premise that this Court's ruling in *P.J. Video* diluted the requirements of judicial supervision in the warrant process and constituted a departure from prior law on the subject. Having thus misapprehended and improperly construed this Court's opinion, the New York court decided that the seizure herein was invalid under Article I Section 12 of the State Constitution. It thereupon upheld the order of the court of first instance suppressing the films at issue.

As a result of the state court's misinterpretation of this Court's holding, it failed to comply with the mandate to consider this case in a manner not inconsistent with the Supreme Court determination. It is this error which forms the basis of the instant petition for writ of certiorari.

REASON FOR GRANTING CERTIORARI

The New York Court of Appeals did not comply with the mandate of this Court in that it failed to determine the present cause in proceedings consistent with the opinion issued in New York v. P.J. Video, Inc., ____U.S.____, 106 S.Ct. 1610.

The issue presented by the petition herein is whether the New York Court of Appeals has misconstrued the meaning of the Supreme Court decision in the present case. It is petitioner's position that the Court of Appeals has erroneously interpreted this Court's holding and as a result has failed to carry out the mandate to consider the instant case in accord with the principles recognized in *New York v. P.J. Video,* ____U.S.____, 106 S.Ct. 1610. In addition, since the New York Court's creation of a separate state standard must be viewed as contingent upon its rejection of the analysis put forward by this Court, the flawed construction given this Court's opinion served to deny petitioner a fair hearing of the issues presented by this case.

Perhaps the most significant of the errors contained in the state court's opinion is its conclusion that this Court in *P.J. Video* has diminished the role of the magistrate in the warrant process:

> "These decisions[1] reflect a concern that the Fourth Amendment rules governing police conduct have been muddied, and judicial supervision of the warrant process diluted, thus heightening the danger that our citizens' rights against unreasonable police intrusions might be violated. We see the Supreme Court's present ruling as a similar dilution of the requirements of judicial supervision in the warrant process and as a departure from prior law on the subject. As we read the Court's decision, it condones a probable cause determination by a magistrate based only upon the strength of the showing of probable cause as it relates to one of several necessary elements of the crime involved" (B-9).

Relating this to the facts of the case, the court interpreted the Supreme Court's approach as "[sanctioning] a determination of probable cause based solely on the police affiant's showing that the films contained numerous sexually explicit scenes and his conclusory assertions that the scenes were representative of the films as a whole" (B-10). It understood this Court to have determined that "the evidence of explicit, offensive sexual content [was] sufficiently strong to compensate for the officer's failure to submit evidence that the films lacked intrinsic worth and violated community standards" (B-10).

The state appellate court supported its interpretation of the holding in *P.J. Video* by reference to *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317 (1983). Finding *Gates* to have been construed by *P.J. Video,* the majority below noted:

> "In this case, the Supreme Court extended the reach of this

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[1] The cases cited by the Court of Appeals to illustrate its concern with this Court's decisions relevant to the Fourth Amendment include: *People v. Johnson,* 66 N.Y.2d 398; *People v. Class,* 67 N.Y.2d 431, *on remand from New York v. Class,* ____US____, 106 S.Ct. 960; *People v. Gokey,* 60 N.Y.2d 309; *People v. Belton,* 55 N.Y.2d 49, *on remand from New York v. Belton,* 453 U.S. 454; *People v. Elwell,* 50 N.Y.2d 231; *People v. Marsh,* 20 N.Y.2d 98; *People v. Bigelow,* 66 N.Y.2d 417 [discussing *United States v. Leon,* 468 U.S. 897; *Massachusetts v. Sheppard,* 468 U.S 981]; *People v. Johnson,* 66 N.Y.2d 398; *People v. Landy,* 49 N.Y.2d 369.

> 'totality of the circumstances/fair probability' standard and applied it for the first time to an obscenity case to permit the magistrate to focus generally on the explicit nature of pornographic material without specifically considering the other statutory elements of the crime (See *New York v. P.J. Video, Inc.*, ____US____, 106 SCt 1610, 1615-1616, *supra* [construing *Gates*]). (B-5).

To the end of its opinion, the Court of Appeals continuously mischaracterized the *P.J. Video* decision to the point of suggesting that this Court had ignored or recast the state's legislative mandate:

> "The Supreme Court's decision in this case has in effect, stated that certain elements of our statutory definition of a crime are not significant. We are not free to similarly ignore or recast the legislative mandate" (B-13).

As a first consideration, the court's assertion that the judicial role in the issuance of search warrants has been weakened by the Supreme Court opinion and that the warrants in the instant case were based upon the conclusory allegations of a police affiant rather than upon the exercise of the issuing magistrate's discretion is not supported by the language of this Court's opinion. In specific reliance upon the decision in *Heller v. New York,* 413 U.S. 483, 93 S.Ct. 2789 (1973), this Court affirmed and emphasized the necessity for a prior judicial determination of probable cause in cases involving material presumptively protected by the First Amendment (*P.J. Video*, 106 S.Ct. 1610, 1615). Such requirement, coupled with the longstanding special protections accorded First Amendment materials in cases such as *Roaden v. Kentucky,* 413 U.S. 496, 93 S.Ct. 2796 (1973), *A Quantity of Books v. Kansas,* 378 U.S. 205, 84 S.Ct. 1723 (1964) and *Lee Art Theatre, Inc. v. Virginia,* 392 U.S. 636, 88 S.Ct. 2103 (1968), was held to adequately ensure that First Amendment interests will not be impaired by the issuance and execution of warrants authorizing the seizure of books or films. Neither in its language nor in its

result does the opinion under consideration dilute the requirement for judicial supervision of warrants.

Similarly this Court's opinion contraverts the Court of Appeals' conclusion that under the Supreme Court decision a warrant could be based upon a showing of explicit sex alone. This Court clearly stated that a magistrate issuing a warrant for the seizure of books or films must have probable cause to believe that such materials constitute evidence of a crime (A-8, 9). Since under the *Miller* test (*Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607 (1973)), sexually explicit or offensive scenes, without more, are insufficient to support an obscenity determination, such scenes, without more, must also be insufficient as evidence of a crime. A fair reading of this Court's decision yields the conclusion that the evidence before the magistrate, be it direct or based upon inference, must provide reason to believe that the material under scrutiny is violative of the three-pronged *Miller* definition of obscenity, codified in New York as Penal Law §235.00(1). The occurrence in an otherwise protected work of an explicit or offensive sexual act or series of such acts could not, standing alone, properly support the issuance of a warrant under federal law.

This Court in reviewing the facts of the instant case found that the affidavits satisfied not only the second prong of the *Miller* test but also the first and third prongs. By holding that "the issuing justice was given more than enough information to conclude that there was a 'fair probability' that the movies satisfied the first and third elements of the statutory definition" (A-9), this Court explicitly rejected the conclusion drawn by the Court of Appeals in its first opinion that, "In short, none of the affidavits permit an inference that the scenes described are more than a catalog of offensive parts of the whole" (*People v. P.J. Video,* 65 NY2d 566, 571, 483 NE2d 1120).

The state court's conclusion that *Gates* represents a break with this Court's precedents on the issue of probable cause and that *P.J. Video* constitutes an extension of the *Gates* analysis to ob-

scenity for the first time further misconceives the import of this Court's opinion. As observed by the dissent on remand, "Nothing in the Supreme Court's reference to *Illinois v. Gates* suggests that the court was applying anything other than its established rule for assessing the adequacy of an application for a warrant to seize materials as evidence in an obscenity case where the seizure will not result in a 'prior restraint' (*See, Heller v. New York*, 413 US 853)" (B-26). The standard applied, i.e. that there be a fair probability that contraband or evidence of a crime will be found in a particular place, is but a restatement of the established general rule for probable cause (*See Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725 (1960), *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302 (1949)). The state court's assertion that such standard constitutes a departure from prior law on obscenity is soundly refuted by reference to *Heller* which, as observed by this Court, "[eschewed] any suggestion that the standard of probable cause in the First Amendment area is different than in other contexts" (A-7).

Based upon a misconstruction and misinterpretation of this Court's opinions in *P.J. Video* and *Gates*, the Court of Appeals decided that Article I, Section 12 of the New York State Constitution "imposes a more exacting standard for the issuance of search warrants authorizing the seizure of allegedly obscene material than does the Federal Constitution" (B-2). Indicating that its decision was made in reliance "principally on established federal and state law because we believe the arguments supporting that body of law are more persuasive than the arguments supporting application of the *Gates* rule in this obscenity case," (B-7), the court purported to define a new New York standard imposing "a specific, nondelegable burden on the magistrate which require[s] that he, not the police, determine probable cause" and that his determination "be objectively verifiable" (B-11).

It is submitted that this Court's holding relevant to this case does not represent a break with past precedents involving ob-

scenity. The probable cause standard in obscenity cases has not been lowered nor has the role of the magistrate in the warrant process been reduced. But for such misinterpretations by the Court of Appeals, it is clear that there would have been no contrary ruling under the New York State Constitution. This being the case, this Court can properly clarify its decision in order to permit its mandate to be carried out (*Oregon v. Mathiason,* 429 U.S. 711, 97 S.Ct. 711, *Schlude v. CIR,* 372 U.S. 129, 83 S.Ct. 601, *Wilkinson v. United States,* 365 U.S. 399, 81 S.Ct. 567, *McCandless v. Furlaud,* 296 U.S. 40, 56 S.Ct. 41).

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant the within petition.

Respectfully submitted,

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December 19, 1986.

APPENDIX A

NEW YORK, Petitioner

v.

P.J. VIDEO, INC., dba Network Video, et al.

No. 85-363.

Argued March 4, 1986.

Decided April 22, 1986.

John J. DeFranks, Buffalo, N.Y., for petitioner.

Paul John Cambria, Jr., Buffalo, N.Y., for respondent.

Justice REHNQUIST delivered the opinion of the Court.

This case concerns the proper standard for issuance of a warrant authorizing the seizure of materials presumptively protected by the First Amendment. Respondents P.J. Video, Inc., and James Erhardt were charged in the Village of Depew, New York, Justice Court with six counts of obscenity in the third degree under § 235.05(1) of the New York Penal Law.[1] Respondents moved

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[1] Section 235.05(1) (McKinney Supp. 1986) provides:

"A person is guilty of obscenity in the third degree when, knowing its content and character, he:

"1. Promotes, or possesses with intent to promote, any obscene material . . . ."

"Obscenity in the third degree is a class A misdemeanor."

The statutory definition of "obscenity," which is derived from *Miller v. California*, , 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), appears at § 235.00(1) (McKinney 1980):

". . . Any material or performance is 'obscene' if (a) the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex, and (b) it depicts or describes in a patently offensive manner, actual or simulated: sexual intercourse, sodomy, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals, and (c) considered as a whole, it lacks serious literary, artistic, political, and scientific value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audiences."

to suppress five videocassette movies that had been seized from respondents' store, and that formed the basis for the obscenity charges against respondents, on the ground that the warrant authorizing the seizure was issued without probable cause to believe that the movies were obscene. The Justice Court granted the motion and dismissed the informations under which respondents were charged, and both the County Court of Erie County and the New York Court of Appeals affirmed. 65 N.Y.2d 566, 493 N.Y.S.2d 988, 483 N.E.2d 1120 (1985). We granted certiorari to resolve the conflict between the decision of the New York Court of Appeals in the instant case and the decisions in *Sequoia Books, Inc. v. McDonald*, 725 F.2d 1091 (CA7 1984), and *United States v. Pryba*, 163 U.S.App.D.C. 389, 502 F.2d 391 (1974), cert. denied, 419 U.S. 1127, 95 S.Ct. 815, 42 L.Ed.2d 828 (1975). 474 U.S. ____, 106 S.Ct. 244, 88 L.Ed.2d 253 (1985). We now reverse the judgment of the Court of Appeals.

The obscenity charges against respondents arose out of an investigation by the Erie County District Attorney's Office. Investigator David J. Groblewski was assigned to review 10 videocassette movies that had been rented from respondents' store by a member of the Erie County Sheriff's Department.[2] Groblewski viewed the movies in their entirety, and executed affidavits summarizing the theme of, and conduct depicted in, each film. The affidavits were attached to an application filed by the Village of Depew Police Department for a warrant to search respondents' store.

A justice of the New York Supreme Court issued the warrant, authorizing the search of the store and the seizure of the movies. The warrant was executed the next day, and, according to a sworn, itemized inventory statement, the police seized one or two copies of each of the 10 movies. A total of 13 videocassettes were

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[2] The 10 movies were entitled "California Valley Girls," "Taboo II," "Taboo," "All American Girls," "Debbie Does Dallas," "Body Magic," "Deep Throat," "Every Which Way She Can," "Filthy Rich," and "Little Girls Blue."

seized. The justice who had issued the warrant ordered that the videocassettes be temporarily retained by the police as evidence for trial. See N.Y.Crim.Proc.Law §§ 690.05-690.55 (McKinney 1984).

Respondents ultimately were charged in the Village of Depew Justice Court with violating the New York obscenity laws with respect to only 5 of the 10 movies. The affidavits describing these five movies appear in full in the appendix to this opinion.[3] Respondents moved for suppression of the seized videocassettes, alleging that the warrant authorizing their seizure was not supported by probable cause because the issuing justice had not personally viewed the movies. The Justice Court granted the motion and dismissed the informations under which respondents were charged, and on the State's appeal the County Court of Erie County affirmed.

The New York Court of Appeals likewise affirmed, although on a different theory than that of the Justice Court. According to the Court of Appeals, "there is a higher standard for evaluation of a warrant application seeking to seize such things as books and films, as distinguished from one seeking to seize weapons or drugs, for example (*Roaden v. Kentucky,* [413 U.S. 496], 504 [93 S.Ct. 2786, 2801, 37 L.Ed.2d 757] [1973]; *Marcus v. Search Warrant,* 367 U.S. 717, 730-731 [81 S.Ct. 1708, 1715-16, 6 L.Ed.2d 1127] [1961]). In applying the [Fourth] Amendment to such items, the court must act with 'scrupulous exactitude' (*Stanford v. Texas,* 379 U.S. 476, 481-485 [85 S.Ct. 506, 509-12, 13 L.ed.2d 431] [1965]; *see also, Maryland v. Macon,* 472 U.S. ____, 105 S.Ct. 2778, 86 L.Ed.2d 370 [1985])." Using this "higher" probable cause standard to review the affidavits submitted in support of the warrant application, the Court of Appeals stated:

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[3] The five movies that formed the basis for the obscenity charges against respondents were "California Valley Girls," "Taboo II," "Taboo," "All American Girls," and "Debbie Does Dallas."

"Many of the scenes described contain explicit sexual activity, patently offensive by any constitutional standard, but the allegations of the affidavits do not indicate whether they constitute all, most or a few of the scenes presented in the films. . . . The descriptions of the action are not supplemented by references to the narrative or dialogue of the films and the affiant attempted to describe the 'character' or 'theme' of the movies by settings having nothing to do with the plot. . . . He made no attempt to reveal the story line (or lack of one) of the films or demonstrate that their 'predominant appeal' was to prurient interest. In short, none of the affidavits permit an inference that the scenes described are more than a catalog of offensive parts of the whole." *Id.*, at 570-571, 493 N.Y.S.2d, at 992, 483 N.E.2d, at 1124.

The Court of Appeals concluded that the affidavits did not contain sufficient information to permit the issuing justice, "applying contemporary community standards, to judge the films as a whole and determine that they are within the statutory definitions of obscenity and thus are not entitled to constitutional protection." *Id.*, at 572, 493 N.Y.S.2d, at 992, 483 N.E.2d, at 1124 (footnote omitted). One judge dissented, arguing that the affidavits contained enough information for the issuing justice "to reasonably believe that the video movies were obscene as legisla-

tively defined." *Id.*, at 573, N.Y.S.2d, at 993, 483 N.E.2d, at 1125 (Jasen, J., dissenting).[4]

We have long recognized that the seizure of films or books on the basis of their content implicates First Amendment concerns not raised by other kinds of seizures. For this reason, we have required that certain special conditions be met before such seizures may be carried out. In *Roaden v. Kentucky*, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973), for example, we held that the police may not rely on the "exigency" exception to the Fourth Amendment's warrant requirement in conducting a seizure of allegedly obscene materials, under circumstances where such a seizure would effectively constitute a "prior restraint." In *A Quantity of Books v. Kansas*, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809 (1964), and *Marcus v. Search Warrant*, 367 U.S. 717, 81 S.Ct.

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[4] Respondents argue that the decision of the New York Court of Appeals rested on adequate and independent state grounds, namely, provisions of the New York Constitution and various state-court decisions, and that we therefore lack jurisdiction to review that decision. We disagree. As we explained in *Caldwell v. Mississippi*, 472 U.S. ____, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985):

[W]e will not assume that a state-court decision rests on adequate and independent state grounds when the 'state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion.' " *Id.*, at ____, 105 S.Ct., at 2638, quoting *Michigan v. Long*, 463 U.S. 1032, 1040-1041, 103 S.Ct. 3469, 3475-76, 77 L.Ed.2d 1201 (1983).

Here, the New York Court of Appeals cited the New York Constitution only once, near the beginning of its opinion, and in the same parenthetical also cited the Fourth Amendment to the United States Constitution. Moreover, the Court of Appeals repeatedly referred to the "First Amendment" and "Fourth Amendment" during its discussion of the merits of the case, strongly indicating that it believed that its decision was governed by federal law. Finally, although the Court of Appeals cited several state-court decisions, the only citations appended to the crucial language quoted in the text were to the federal decisions in *Roaden v. Kentucky*, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973), *Marcus v. Search Warrant*, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961), *Stanford v. Texas*, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965), and *Maryland v. Macon*, 472 U.S. ____, 105 S.Ct. 2778, 86 L.Ed.2d 370 (1985). We conclude, in the absence of a "plain statement" to the contrary, that the decision of the Court of Appeals was premised on federal, not state, law.

1708, 6 L.Ed.2d 1127 (1961), we had gone a step farther, ruling that the large-scale seizure of books or films constituting a "prior restraint" must be preceded by an adversary hearing on the question of obscenity. In *Heller v. New York*, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973), we emphasized that, even where a seizure of allegedly obscene materials would not constitute a "prior restraint," but instead would merely preserve evidence for trial, the seizure must be made pursuant to a warrant and there must be an opportunity for a prompt post-seizure judicial determination of obscenity. And in *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636, 88 S.Ct. 2103, 20 L.Ed.2d 1313 (1968), we held that a warrant authorizing the seizure of materials presumptively protected by the First Amendment may not issue based solely on the conclusory allegations of a police officer that the sought-after materials are obscene, but instead must be supported by affidavits setting forth specific facts in order that the issuing magistrate may "focus searchingly on the question of obscenity." *Marcus, supra*, at 732, 81 S.Ct., at 1716; see also *Stanford v. Texas*, 379 U.S. 476, 486, 85 S.Ct. 506, 512, 13 L.Ed.2d 431 (1965).[5]

The New York Court of Appeals construed our prior decisions in this area as standing for the additional proposition that an application for a warrant authorizing the seizure of books or films must be evaluated under a "higher" standard of probable cause than that used in other areas of Fourth Amendment law. But we have never held or said that such a "higher" standard is required by the First Amendment. In *Heller*, we said:

"[S]eizing films to destroy them or to block their distribu-

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[5] Contrary to the position apparently taken by the Justice Court in the instant case, we have never held that a magistrate must personally view allegedly obscene films prior to issuing a warrant authorizing their seizure. See *Lee Art Theatre, Inc. v. Virginia*, 392 U.S., at 637, 88 S.Ct., at 2104. On the contrary, we think that a reasonably specific affidavit describing the content of a film generally provides an adequate basis for the magistrate to determine whether there is probable cause to believe that the film is obscene, and whether a warrant authorizing the seizure of the film should issue.

> tion or exhibition is a very different matter from seizing a single copy of a film for the *bona fide* purpose of preserving it as evidence in a criminal proceeding, particularly where, as here, there is no showing or pretrial claim that the seizure of the copy prevented continuing exhibition of the film. If such a seizure is pursuant to a warrant, *issued after a determination of probable cause by a neutral magistrate,* and, following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interest party, the seizure is constitutionally permissible. . . .
> "*The necessity for a prior judicial determination of probable cause* will protect against gross abuses. . . ." 413 U.S., at 492-493, 93 S.Ct., at 2795 (emphasis added; footnotes omitted).

[1] We think that this passage from *Heller,* emphasizing the requirement that the magistrate determine probable cause as a means of safeguarding First Amendment interests, and eschewing any suggestion that the standard of probable cause in the First Amendment area is different than in other contexts, suggests that we saw no need for the latter requirement. In our view, the longstanding special protections described above, and enunciated in cases such as *Roaden, A Quantity of Books, Marcus, Heller,* and *Lee Art Theatre,* are adequate to ensure that First Amendment interests will not be impaired by the issuance and execution of warrants authorizing the seizure of books or films. We think, and accordingly hold, that an application for a warrant authorizing the seizure of materials presumptively protected by the First Amendment should be evaluated under the same stand-

ard of probable cause used to review warrant applications generally.[6]

[2] That standard was recently set forth by this Court in *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983):

> " '[T]he term "probable cause," . . . means less than evidence which would justify condemnation. . . . It imports a seizure made under circumstances which warrant suspicion.' [*Locke v. United States,* 7 Cranch 339, 348 [11 U.S. 339, 348, 3 L.Ed.2d 364] (1813).]. . . Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision.
>
> . . . .
>
> "The task of the issuing magistrate is simply to make a prac-

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[6] Respondents contend that the seizure in the instant case was not limited to only one copy of each film, but instead extended to all copies of the films that the police were able to find during their search of respondents' store. According to respondents, the seizure had the effect of severely restricting public access to the films, and thereby constituted a "prior restraint." Respondents therefore argue that this case is properly governed not by *Heller v. New York,* 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973), but by *Roaden v. Kentucky,* 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973), where this Court stated that the seizure of an allegedly obscene film, under circumstances where the seizure "brought to an abrupt halt an orderly and presumptively legitimate . . . exhibition" of the film, "calls for a higher hurdle in the evaluation of reasonableness." *Id.,* at 504, 93 S.Ct., at 2801.

We reject this contention. Our reference in *Roaden* to a "higher hurdle . . . of reasonableness" was not intended to establish a "higher" standard of probable cause for the issuance of a warrant to seize books or films, but instead related to the more basic requirement, imposed by that decision, that the police not rely on the "exigency" exception to the Fourth Amendment warrant requirement, but instead obtain a warrant from a magistrate who has "focus[ed] searchingly on the question of obscenity." *Id.,* at 506, 93 S.Ct., at 2802, quoting *Marcus v. Search Warrant,* 367 U.S. 717, 732, 81 S.Ct. 1708, 1716, 6 L.Ed.2d 1127 (1961).

We also note that the burden is on the defendant to make a pretrial showing of a "substantial restraint" if he wishes to escape the rule of *Heller, supra,* that a mere seizure to preserve evidence does not impose on the State a duty to conduct an adversary hearing of the sort described in *Marcus, supra.* Respondents made no such pretrial showing in this case.

> tical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing,]' [*Jones v. United States,* 362 U.S. 257, 271, 80 S.Ct. 725, 736, 4 L.Ed.2d 697 (1960),] that probable cause existed." *Id.,* 462 U.S., at 235, 238-239, 103 S.Ct., at 2330, 2332-33.

Applying the *Gates* standard to the affidavits in the instant case, we think it clear beyond peradventure that the warrant was supported by probable cause to believe that the five films at issue were obscene under New York law. Respondents concede that the affidavits describing the five films adequately established probable cause with respect to the second of the three elements of obscenity under the statute, namely, that the movies depicted "in a patently offensive manner" the various kinds of sexual conduct specified in the statute. See N.Y. Penal Law § 235.00(1)(b) (McKinney 1980). Our review of the affidavits convinces us that the issuing justice also was given more than enough information to conclude that there was a "fair probability" that the movies satisfied the first and third elements of the statutory definition, namely, that the "predominant appeal [of the movies] is to the prurient interest in sex," and that the movies "lac[k] serious literary, artistic, political, and scientific value." See N.Y. Penal Law §§ 235.00(1)(a), (c) (McKinney 1980). As Judge Jasen of the Court of Appeals noted in his dissent in the present case:

> "Each of the affidavits describing the films clearly state at the outset that 'the *content* and character of the above mentioned video movie is as follows.' Inasmuch as the magistrate was reviewing affidavits describing movies which were advertised by defendants as 'adult cassette movies,' it was reasonable for him to believe that the affidavits faithfully and accurately described the substance of each movie as a whole. Each affidavit describes the numerous acts of deviate sexual intercourse and the objectification of women occurring in each film which the majority concede to be offen-

> sive. Each film is of relatively short duration. Manifestly, the acts described in each movie consume a substantial time span. Thus, the magistrate may reasonably have concluded that the described, successive acts of deviate sexual intercourse pervaded each film. When the title of each movie is considered together with its plot and setting, its general theme and serious value, if any, may reasonably be discerned. The films were described in each of the five nonconclusory affidavits in such a fashion as to permit the magistrate to focus searchingly on the issue of obscenity. Under these circumstances, there was a reasonable basis for the magistrate to authorize the seizure of the films in question." 65 N.Y.2d, at 580, 493 N.Y.S.2d, at 998, 483 N.E.2d, at 1130 (emphasis in original).

We believe that the analysis and conclusion expressed by the dissenting judge are completely consistent with our statement in *Gates* that "probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." 462 U.S., at 244, n. 13, 103 S.Ct., at 2335, n. 13. We hold that, evaluated under the correct standard of probable cause, the warrant was properly issued and the videocassettes of the five movies should not have been suppressed. The judgment of the New York Court of Appeals is accordingly reversed, and the cause remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

DAVID J. GROBLEWSKI, being duly sworn, deposes and says:

I am presently a Confidential Criminal Investigator assigned to the Erie County District Attorney's Office and prior to this, a member of the New York State Police for approximately 25 years.

On September 26th, 1983 I viewed the video tape movie "CALIFORNIA VALLEY GIRLS," which was rented on September 20th, 1983, from Network Video, 5868 Transit Road, Depew, New York. This movie was rented by Detective Sergeant Vincent Costanza, a member of the Erie County Sheriff's Department. This movie was viewed in my office starting at 12:00 Noon and lasted until 1:33 P.M.

The content and character of the above mentioned video movie is as follows: Six white females, approximately 18 to 25 years of age, are unemployed and attempt to make a living by becoming prostitutes. The first scene is a bedroom scene where two females are involved in love making, fondling and cunnilingus. The second scene depicts a white male and a white female having intercourse in the back of a van. The third scene is a house scene where six girls, all white females are introduced to the art of love making. One male, approximately 35 years of age, is teaching the girls the art of fellatio with each one of them performing this act on him. The next scene is a bedroom scene in a home where a husband and wife, a white male and a white female, alone with a girl, a white female, perform various sexual acts which include intercourse, fellatio, anal intercourse and cunnilingus. The movie ends with some lesbianism where the wife performs cunnilingus on the girl while she performs fellatio on the husband and they engage in intercourse and anal intercourse.

[Signature]

David J. Groblewski
Confidential Criminal
Investigator

Subscribed and sworn to

before me this [21] day
of November, 1983.

[Signature]
Notary Public

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

DAVID J. GROBLEWSKI, being duly sworn, deposes and says:

I am presently a Confidential Criminal Investigator assigned to the Erie County District Attorney's Office and prior to this, a member of the New York State Police for approximately 25 years.

On September 26th, 1983 I viewed the video tape movie "TA-BOO II," which was rented on September 20th, 1983, from Network Video, 5868 Transit Road, Depew, New York. This movie was rented by Detective Sergeant Vincent Costanza, a member of the Erie County Sheriff's Department. This movie was viewed in my office starting at 9:00 A.M. and with several interruptions lasted until 12:12 P.M.

The content and character of the above mentioned video movie: The theme of the movie is a middle-class neighborhood where a home is the place where all the sexual acts are performed. The movie starts with a brother and sister, a white male and white female, fondling each other. The second scene is another house scene where a white male and white female are giving a rubdown to a white female. The sexual acts that follow include cunnilingus and fellatio. There is also intercourse and the scene closes with the male placing his penis between the girl's breasts and ejaculating into and over her mouth. In another scene there is some incestuous type activity between the brother and the sister where again

fellatio and intercourse are performed. At one point during the movie the mother enters the bedroom and observes the two performing the sexual acts and becomes depressed about the situation. In a later scene the son and his mother are on a couch where they become involved in sexual acts of intercourse and fellatio. The movie closes with the mother and father asleep in their bedroom at which time the daughter enters and sleeps next to her father, where they perform incestuous acts of intercourse, and she performs fellatio on her father.

[Signature]

Subscribed and sworn to before me
this [21] day of November, 1983

[Signature]
Notary Public

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

DAVID J. GROBLEWSKI, being duly sworn, deposes and says:

I am presently a Confidential Criminal Investigator assigned to the Erie County District Attorney's Office and prior to this, a member of the New York State Police for approximately 25 years.

On September 29th, 1983 I viewed the video tape movie "TABOO," which was rented on September 27th, 1983, from Network Video, 5868 Transit Road, Depew, New York. This movie was rented by Detective Sergeant Vincent Costanza, a member of the Erie County Sheriff's Department. This movie was viewed in my office starting at 11:00 A.M. and lasted until 11:55 A.M. and

watched again commencing at 1:42 P.M. and lasting until 2:23 P.M.

The content and character of the above mentioned video movie is as follows: The first scene is a bedroom scene where two white females and one white male perform various acts of fellatio, cunnilingus and intercourse. The second scene is a house party scene where many white males and white females are involved in various acts of intercourse, fellatio and cunnilingus. There is also a scene where females perform acts of cunnilingus on each other. The movie portrays at one point a bedroom scene with a white male, the son, laying in bed naked, at which time his mother, a white female enters the room. She makes love to him and incestuous acts of intercourse, placing of the penis between her breasts, ejaculation and cunnilingus are performed.

[Signature]

David J. Groblewski
Confidential Criminal
Investigator

Subscribed and sworn to
before me this [21] day
of November, 1983.

[Signature]
Notary Public

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

DAVID J. GROBLEWSKI, being duly sworn, deposes and says:

I am presently a Confidential Criminal Investigator assigned to the Erie County District Attorney's Office and prior to this, a

member of the New York State Police for approximately 25 years.

On September 28th, 1983, Detective Sergeant Vincent Costanza, a member of the Erie County Sheriff's Department and I viewed the video tape movie "ALL AMERICAN GIRLS," which was rented on September 27th, 1983 from Network Video, 5868 Transit Road, Depew, New York. This movie was viewed in my office starting at 11:35 A.M., and lasted until 1:00 P.M.

The content and character of the above mentioned video movie is as follows: The theme of the movie is a home of one of the six girls, all white females who had previously attended high school and were meeting for a reunion. The first scene is two girls in a room performing acts of lesbianism, namely cunnilingus on each other. They are met by a white male and they perform acts of fellatio on him, have intercourse and all leave the room. Throughout the movie the girls reminisce about their high school days with each one depicting her sexual acts with her male partner. The sexual acts which followed included intercourse, fellatio and cunnilingus.

[Signature]

David J. Groblewski
Confidential Criminal
Investigator

Subscribed and sworn to
before me this [21] day
of November, 1983.

[Signature]
Notary Public

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

DAVID J. GROBLEWSKI, being duly sworn, deposes and says:

I am presently a Confidential Criminal Investigator assigned to the Erie County District Attorney's Office and prior to this, a member of the New York State Police for approximately 25 years.

On October 3rd, 1983, Detective Sergeant Vincent Costanza, a member of the Erie County Sheriff's Department and I viewed the video tape movie "DEBBIE DOES DALLAS," which was rented on September 30th, 1983, by Vincent Costanza from Network Video, 5868 Transit Road, Depew, New York. This movie was viewed in my office starting at 2:50 P.M., and lasted until 4:23 P.M.

The content and character of the above mentioned video movie is as follows: The theme of the movie is a girl moving out west for a change of atmosphere. The first scene is a jail scene where a white female is in jail after she had been put there by the so-called Sheriff, a white male, and she performs fellatio on him. The two then perform intercourse, at which time he removes his pants and ejaculates over her buttocks. The second scene is the ranch, a so-called house of ill repute, a bedroom scene in which a white male and a white female are involved in various sexual acts including fellatio, cunnilingus and intercourse. At the end of the scene the male ejaculates in and over the female's mouth. The third scene, a bathroom scene, depicts some lesbianism involving three girls. They participate in love making, foreplay and performing cunnilingus on each other. Throughout, the movie depicts some lesbianism along with sexual acts of intercourse, fellatio and cunnilingus.

[Signature]

David J. Groblewski
Confidential Criminal
Investigator

Subscribed and sworn to before
me this [21] day of November, 1983.

[Signature]
Notary Public

Justice MARSHALL, with whom, Justice BRENNAN and Justice STEVENS join, dissenting.

Under New York law, a film depicting specified sexual acts in a patently offensive manner is obscene if "the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex," and if "considered as a whole, it lacks serious literary, artistic, political, and scientific value." N.Y. Penal Law §§ 235.00(1)(a), (c) (McKinney 1980). The question before this Court is whether three New York state courts erred in holding that the affidavits at issue in this case failed to establish probable cause that those standards were met.[1] The determination of what the standards of § 235.00(1) mean and how they should be applied in individual cases, of course, is in the first instance a matter of state law and the rightful province of the state courts. While the majority describes it as "clear beyond peradventure," *ante*, at 8, that the affidavits set out the requisite probable cause, I do not find that result "clear" at all, and I would not overturn the state courts' contrary judgment.

I

The affidavits at issue in this case were first found inadequate at a suppression hearing in the Depew Justice Court. The court, per Justice Wick, noted that the issuing Magistrate had appar-

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[1] The New York Court of Appeals held that the third branch of the statute, providing that a film, to be obscene, must depict specified sexual acts "in a patently offensive manner, actual or simulated," § 235.00(1))b), was satisfied by the descriptions in the affidavits in this case. 65 N.Y.2d 566, 570, n. 1, 493 N.Y.S.2d 988, 991, n. 1, 483 N.E.2d 1120, 1123, n. 1 (1985).

ently not himself viewed the films, and that the retired State Trooper who compiled the affidavits had "obviously paid no attention to contemporary community standards" and "made no further determination if the presentations had any literary, artistic, political or scientific value." App. to Pet. for Cert. A-37. Without stating clearly the exact basis of its decision, the court noted that "[t]he material contained [in the films] may be of the type proscribed by Section 235.05 of the Penal Law but equally, it may be . . . 'course, puerile, offensive and distasteful (and still not) obscene under the law or proscribable.' " *Id.*, at A-38, quoting *People v. Stabile*, 59 Misc.2d 905, 296 N.Y.S.2d 815 (N.Y.C.Crim.Ct.1969). The court granted respondents' suppression motion.

The Erie County Court affirmed. Justice LaMendola noted the absence of a transcript of the proceedings, if any, before the issuing Magistrate, and declared it within the lower court's discretion to hold that "under New York law, the issuing magistrate had failed to make an adequate finding of probable cause . . . because he relied solely on the affidavits of the police officers without any further investigation or viewing of the materials to be confiscated." App. to Pet. for Cert. at A-33. Justice LaMendola's reference to "further investigation *or* viewing" makes it plain that she did not regard the issuing Magistrate's viewing of the film as an invariable requisite to issuance of a warrant. The affidavits in this case, however, unsupported by further investigation, provided insufficient basis for a warrant authorization.

The New York Court of Appeals affirmed. The court recognized that "the task of the issuing magistrate was not to decide guilt or innocence but to determine in a preliminary way from the information submitted and available to him whether there was probable cause to believe that the material to be seized was obscene within the tripartite definition of the statute." 65 N.Y.2d 566, 570, 493 N.Y.S.2d 988, 991, 483 N.E.2d 1120, 1123 (1985). Applying that standard, it held the affidavits insufficient.

Near the beginning of its opinion, the New York court reiterated this Court's recent direction that the Fourth Amendment be applied with " 'scrupulous exactitude' " in cases of searches for a seizures of presumptively protected materials, *Maryland v. Macon*, 472 U.S. ____, ____, 105 S.Ct. 2778, ____, 86 L.Ed.2d 370 (1985); see also *Stanford v. Texas*, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965), and noted a "higher standard" for warrant determinations when books and films are seized, citing *Roaden v. Kentucky*, 413 U.S. 496, 93 S.Ct. 2796, 2797, 37 L.Ed.2d 757 (1973). The New York court did not go on, however, to apply any extraordinary standard of scrutiny to the determination of probable cause. Rather, its holding was a simple one: "There must be enough information before [the issuing magistrate] in one form or other . . . to enable him to judge the obscenity of the film, not of isolated scenes from it." 65 N.Y.2d, at 571, 493 N.Y.S.2d, at 992, 483 N.E.2d, at 1124. The affidavits, the court explained, merely catalogued offensive sex acts depicted in the films. Such catalogs say nothing about the "predominant appeal" of a film, its impact "considered as a whole," or its overall literary or artistic value. "Undoubtedly, similar lists could readily be compiled by excerpting descriptions of scenes from books and movies having recognized merit. Stanley Kubrick's 'Clockwork Orange' and Federico Fellini's 'Satyricon' come quickly to mind." *Ibid.* Because obscenity law requires examination of the films as a whole, the court held, probable cause cannot be inferred from the description of a few excerpted scenes. *Id.*, at 572, 493 N.Y.S.2d, at 992, 483 N.E.2d, at 1124.

II

Taken in the abstract, the New York court's reasoning is unassailable. A mere listing of sex acts depicted in a film, or a description of excerpted scenes, says little about the predominant effect of the film considered as a whole. It says nothing about whether the film, considered as a whole, has any artistic value. And it says nothing about how the film should be regarded in light of con-

temporary community standards. Such a description, then, cannot establish even probable cause to believe that the film is obscene. "[S]ex and obscenity are not synonomous." *Roth v. United States,* 354 U.S. 476, 487, 77 S.Ct. 1304, 1310, 1 L.Ed.2d 1498 (1957).[2] A magistrate armed only with such a description cannot " 'focus searchingly on the question of obscenity,' " as the majority, *ante,* at 1614, concedes he is obligated to do.

The majority's rejection of the New York court's reasoning appears to derive from a largely unarticulated feeling that that reasoning is inappropriately applied in the present case. As a result, notwithstanding the sweeping legal principles set out in the majority's opinion, the decision of this case ultimately rests on the mundane application of clear law to undisputed facts. The majority suggests that the New York court wrongly applied its law because the affidavits described more than excerpted scenes: they allowed the Magistrate to discern the " 'general theme and serious value' " of the films, and established that sex acts " 'pervaded' " each film. *Ante,* at 1616.

The problem with the majority's approach is that it is unsupported in the texts of the affidavits. Although a boilerplate sentence in each affidavit invokes the "content" of the films, and two of the affidavits conclusorily assert that certain sex acts are depicted "throughout" the film, the affidavits do not attempt to describe every scene in the films or even most of the scenes. Rather, the scenes described in the affidavits are simply those the

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[2] Obscene material, considered as a whole, must not only be without serious literary or other merit, but it must, applying contemporary community standards, appeal predominantly to a "shameful or morbid" interest in sex. See *Brockett v. Spokane Arcades, Inc.,* 472 U.S. ____, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985). Indeed, three of the very films described by the affidavits in this case have been declared outside the constitutional boundaries of obscenity. See *United States v. Various Articles of Obscene Merchandise,* 709 F.2d 132 (CA2 1983) ("Deep Throat," "Debbie Does Dallas," and "Little Girls Blue" not obscene, applying community standards of Southern District of New York).

author chose to describe. While descriptions of sex acts pervade the *affidavits*, it is hardly clear that depictions of sex acts pervade the *films*. Similarly, while the "general tone" of the affidavits is clear, we have little basis for a conclusion about the "general tone" of the films.

The affidavits do not purport to be exhaustive. They can be meaningful in considering the artistic value of the films, taken as a whole, or the films' predominent appeal, only if one assumes that everything, or almost everything, worth noting in the films was incorporated into the affidavits. Nothing in the affidavits, however, justifies that assumption. The affidavits are precisely what the New York Court of Appeals condemned: mere listings of selected scenes from the films that involved depictions of sex. The films described could as well be "Last Tango in Paris."

The majority's decision upholding a warrant authorization uninformed by any information relating to crucial elements of the definition of obscenity is especially incongruous because the majority overrules the institution most closely attuned to the content of those elements: the New York courts. The New York courts are well suited to decide whether, on the basis of "contemporary community standards," the information supporting a warrant authorization allows the magistrate to focus searchingly on the question of obscenity, and to find probable cause that given material is obscene. The New York courts have unanimously held in this case that the affidavits were insufficient to achieve that end. The majority's eagerness to reverse that fact bound determination in order to expedite an obscenity prosecution is inappropriate and reflects a dubious notion of this Court's institutional role. Cf. *California v. Carney*, ____U.S.____, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985) (STEVENS, J., dissenting).

I dissent.

APPENDIX B

APPENDIX B — OPINION OF NEW YORK STATE COURT OF APPEALS

[OPINION — This opinion is uncorrected and subject to revision before publication in the New York Reports.]

State of New York
Court of Appeals

CoCt No. 304
The People &c.,
Appellant,
v.
P.J. Video Inc., d/b/a Network Video and James Erhardt,
Respondents.

(304) Richard J. Arcara, DA, Erie County (John J. DeFranks & Jo W. Faber of counsel) for appellant.

Paul J. Cambria & Mary Good, Buffalo, for respondent.

SIMONS, J.

In our earlier decision in this case (65 NY2d 566), we held that the issuing magistrate erred in approving a warrant authorizing the seizure of video cassette films as evidence that defendants were promoting obscenity. The warrants were void, we said, although supported by police affidavits itemizing several scenes of patently offensive sexual conduct, because the evidence before the magistrate did not establish probable cause to believe that the films were obscene within the three-part definition of Penal Law section 235.00. On certiorari review the Supreme Court of the United States found the evidence satisfied the requirements of the Fourth Amendment to the Federal Constitution and it therefore reversed our decision and remanded the case to us so that we could decide whether Article 1, Section 12 of the State Constitu-

tion[1] imposes a more exacting standard for the issuance of search warrants authorizing the seizure of allegedly obscene material than does the Federal Constitution (*People v P.J. Video,* 65 NY2d 566, 575, *reversed and remanded, New York v P.J. Video, Inc.,* ____US____, 106 S Ct 1610). We hold that it does and we therefore affirm the order of County Court suppressing the films.

I

The appeal arises from proceedings instituted in the Village of Depew Justice Court charging defendants with multiple counts of obscenity in the third degree based upon their knowing possession, with intent to promote, of allegedly obscene video cassette films (Penal Law § 235.05[1]). After arraignment, defendants moved to suppress the films contending that the warrant authorizing seizure was not based on probable cause. Justice Court granted the motion and dismissed the informations. County Court affirmed its order and a Judge of this Court granted the People leave to appeal. Upon review we addressed both procedural and substantive issues. The procedural issue concerned the extent of the inquiry a magistrate must make before issuing a warrant to seize materials that may enjoy First Amendment protection.[2] Inasmuch as the magistrate had not viewed the films nor

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[1] Article 1, Section 12 provides, in pertinent part:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[2] In response to the dissent (slip opn, p 6), we would merely point out that our original opinion cited *Maryland v Macon* (472 US____; 105 S Ct 2778); *Roaden v Kentucky* (413 US 496); *Stanford v Texas* (378 US 476); and *Marcus v Search Warrant* (367 US 717) solely on this procedural issue, to determine whether the magistrate had adhered to the warrant process (*see, People v P.J. Video,* 65 NY2d 566, 567-570, *supra*). We did not in our prior opinion, nor do we in this opinion, apply those cases to require that a higher level of substantive proof be submitted to the magistrate.

questioned the police but rather relied solely on the police officer's affidavit for each film, the substantive issue posed was whether the affidavits presented sufficient evidence to enable the magistrate to make an objective determination that there existed probable cause to seize the films because they constituted the fruits, instrumentalities or evidence of a crime. Applying established law, we resolved the procedural issue by stating that the determination of probable cause had to be made by the magistrate, not the police, that it had to be made from information submitted or available to him, and that — because the materials presumptively enjoyed First Amendment protection — the magistrate was required to perform his duty with "scrupulous exactitude" (*People v P.J. Video,* 65 NY2d 566, 568-570, *supra, citing Stanford v Texas,* 379 US 476, 481-485). We held that the magistrate was not required to view the films, or even supplement the affidavits by questioning the investigating officers. If the magistrate relied solely on affidavits, however, the allegations contained in them had to satisfy the legal standards of probable cause, i.e., the information must be sufficient to warrant a person of reasonable caution in the belief that a crime has been committed or that evidence of a crime would be found in a particular place (*see, e.g., People v Bigelow,* 66 NY2d 417, 423; *Wong-Sun v United States,* 371 US 471; *see also,* W. LaFave, Search and Seizure, §§ 3.1[b], 3.7[d]).

On the substantive issue, we noted that before a person may be found guilty of promoting obscenity the materials he promotes must be more than sexually explicit, they must be obscene under the statutory definition. That definition contains three elements: the materials must not only be patently offensive but also, when considered as a whole and judged by the average person applying contemporary community standards, its predominant appeal must be to prurient sex, and it must lack serious literary artistic, political and scientific value (*see, People v P.J. Video,* 65 NY2d

566, 572, *supra* [construing Penal Law § 235.00(1)]).[3] Acknowledging that, in this case, the magistrate had cause to believe that the films violated subdivision b of the statutory definition, we held that he nevertheless erred because the affidavits on which he acted contained only an itemized list of sexual acts, and the police officer's conclusory assertion that the list represented the "content and character" of the films or that such scenes appeared "throughout" the films. Accordingly, we held the magistrate did not have probable cause to support issuance of a warrant to seize the films as evidence of the crime or promoting obscenity because he had permitted the police officer to make the determination for him that the films as a whole appealed predominantly to prurient sex and lacked value (*People v. P.J. Video,* 65 NY2d 566, 572, *supra*).

On certiorari review, the Supreme Court judged probable cause by applying the totality of the circumstances/fair probability test of *Illinois v Gates* (462 US 213). The *Gates* rule originally was adopted to test the reliability of anonymous informants' tips. It overruled the established two-pronged *Aguilar-Spinelli* test (*Aguilar v Texas,* 378 US 108; *Spinelli v United States,* 393 US 410) which required a court to review both the basis of the

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[3] Penal Law § 235.00(1) defines "Obscene" as follows:

"1. 'Obscene.' Any material or performance is 'obscene' if (a) the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex, and (b) it depicts or describes in a patently offensive manner, actual or simulated: sexual intercourse, sodomy, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals, and (c) considered as a whole, it lacks serious literary, artistic, political, and scientific value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience."

This statutory definition resulted from the Legislature's 1974 amendments to the obscenity law which sought to bring New York's definition into conformity with the Supreme Court formulation of obscenity articulated in *Miller v California* (423 US 15) (*see,* Hechtman, Practice Commentary, McKinney's Cons Laws of NY, Book 39, Penal Law § 235.00, p 196).

informant's knowledge and the reliability of his information, to permit a magistrate to now decide whether, given all the circumstances set forth in the police affidavit, there is a *fair probability* that contraband or evidence of a crime will be found in a particular place. In this case, the Supreme Court extended the reach of this "totality of the circumstances/fair probability" standard and applied it, for the first time, to an obscenity case to permit the magistrate to focus generally on the explicit nature of pornographic material without specifically considering the other statutory elements of the crime (*see, New York v P.J. Video, Inc.*, ____US____, 106 S Ct 1610, 1615-1616, *Supra* [*construing Gates*]). Having done so, it remanded the case to us for our further consideration.

II

State courts are bound by the decisions of the Supreme Court when reviewing federal statutes or applying the Federal Constitution. Under established principles of federalism, however, the states also have sovereign powers. When their courts interpret state statutes or the state constitution the decisions of these courts are conclusive if not violative of federal law. Although state courts may not circumscribe rights guaranteed by the Federal Constitution, they may interpret their own law to supplement or expand them (*see, e.g., Pruneyard Shopping Center v Robins,* 477 US 84, 81; *Cooper v California,* 386 US 58, 62; *see also,* 1 R. Rotunda, J. Nowak and J. Young. Treatise on Constitutional Law § 1.6[a]; *see,* Brennan, *State Constitutions and the Protection of Individual Rights,* 90 Harv L Rev 482 [1977]). Thus, notwithstanding that the evidence before the magistrate was sufficient to establish probable cause under the Federal Constitution, we have the power on remand to interpret Article 1, Section 12 of the New York Constitution as requiring more. We turn then to the question whether we should measure probable cause in this case by different standards under the State Constitution.

Courts and commentators have identified many considerations and concerns upon which a state court may rely when determining that its constitution accords greater protection to individual liberties and rights than the protection guaranteed by the Federal Constitution (*see generally, State v Hunt*, 91 N.J. 338 [Handler, J., concurring]; *Symposium: The Emergence of State Constitutional Law*, 63 Tex L Rev 959-1318 [1985]; Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 Syracuse L Rev 731 [1982]; *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 Harv L Rev 1324-1502 [1982]; Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 61 Va L Rev 873, 934-944 [1976]). One basis for relying on the State Constitution arises from an interpretive review of its provisions. If the language of the State Constitution differs from that of its federal counterpart, then the court may conclude that there is a basis for a different interpretation of it (*see*, Maltz, *The Dark Side of State Court Activism*, 63 Tex L Rev 995, 1000-1001, *Supra*). Such an analysis considers whether the textual language of the state constitution specifically recognizes rights not enumerated in the federal constitution; whether language in the state constitution is sufficiently unique to support a broader interpretation of the individual right under state law; whether the history of the adoption of the text reveals an intention to make the state provision coextensive with, or broader than, the parallel federal provision; and whether the very structure and purpose of the state constitution serves to expressly affirm certain rights rather than merely restrain the sovereign power of the state. To contrast, noninterpretive review proceeds from a judicial perception of sound policy, justice and fundamental fairness (*see, id.* at 1001). A noninterpretive analysis attempts to discover, for example, any preexisting state statutory or common law defining the scope of the individual right in question; the history and traditions of the state in its protection of the individual right; any identification of the right in the state constitution as being one of peculiar state or lo-

cal concern; and any distinctive attitudes of the state citizenry toward the definition, scope or protection of the individual right.

Our determination rests on non-interpretive grounds. We rely principally on established federal and state law because we believe the arguments supporting the body of law are more persuasive than the arguments supporting application of the *Gates* rule in this obscenity case, and are consistent with the admonition of an earlier Supreme Court that constitutional provisions for the security of persons and property are to be liberally construed (*see, Boyd v United States,* 116 US 616, 634). Our decision, however, is also based on principles of federalism and on New York's long tradition of interpreting our State Constitution to protect individual rights. In this case, we consider two fundamental rights, the right of free expression and the right of citizens to be free from unlawful governmental intrusions.

III

In the past we have frequently applied the State Constitution, in both civil and criminal matters, to define a broader scope of protection than that accorded by the Federal Constitution in cases concerning individual rights and liberties (*see, e.g., Rivers v Katz,* 67 NY2d 485 [right of involuntarily committed mental patients to refuse anti-psychotic medication]; *Bellanca v New York State Liq. Auth.,* 54 NY2d 228, *cert denied,* 456 US 1006 [blanket ban on topless dancing]; *Sharrock v Dell Buick-Cadillac,* 45 NY2d 152 [statutory provisions for foreclosure of garageman's possessory lien]; *People v Isaacson,* 44 NY2d 511 [due process limits on police conduct]; *People v Hobson,* 39 NY2d 479 [right to counsel]. *See generally,* Galie, *State Constitutional Guarantees and Protection of Defendant's Rights: The Case of New York 1960-1978,* 28 Buffalo L Rev 157 [1979]). Our conduct in the area of Fourth Amendment rights has been somewhat more restrained because the history of section 12 supports the presumption that the provision "against unlawful searches and seizures contained in the NY Constitution, article 1, Section 12 con-

forms with that found in the Fourth Amendment, and that this identity of language supports a policy of uniformity between State and Federal courts" (*People v Johnson*, 66 NY2d 398, 406).[4] Based on this, we have sought to fashion search and seizure rules that promote consistency in the interpretations we have given these parallel clauses (*see, id.* [*citing People v Gonzalez*, 62 NY2d 386 (inventory search of cigarette case)]). The interest of federal-state uniformity, however, is simply one consideration to be balanced against other considerations that may argue for a different state rule. When weighed against the ability to protect fundamental constitutional rights, the practical need for uniformity can seldom be a decisive factor (*see, Developments in the Law, supra*, p 1395; *see also*, Galie, *State Constitutional Guarantees and the Protection of Defendant's Rights: The Case of New York, 1960-1978, supra*). Thus, notwithstanding an interest in conforming our State Constitution's restrictions on searches and seizures to those of the Federal Constitution where desirable, this court has adopted independent standards under the State Constitution when doing so best promotes "predictability and precision in judicial review of search and seizure cases and the protection of the individual rights of our citizens" (*People v Johnson*, 66 NY2d 398, 407, *supra; see also, People v Class*, 67 NY2d 431, *on remand from New York v Class*, ____US____, 106 S Ct 960

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[4] The guarantee against unreasonable searches and seizures found in Section 12 was originally contained in a statute, section 8 of the Civil Rights Law, and there is little in the section's textual language, the history of its incorporation into the State Constitution in 1938, or the purpose of the incorporation which would support an interpretation that it was to be applied more expansively than the Fourth Amendment. Indeed, for over 100 years it was not deemed necessary to incorporate the guarantee into the State Constitution because the statutory provision, now Section 12, was deemed generally co-extensive in scope with the Fourth Amendment. Before the Supreme Court decisions in *Wolf v Colorado* (338 US 25) and *Mapp v Ohio* (367 US 643), the only difference between the two was in the application of the exclusionary rule (*see generally*, 1938 NYS Constitutional Convention Committee, Problems Relating to the Bill of Rights and General Welfare, pp 215-218). Accordingly, we do not rely on textual or historical distinctions from the Federal Constitution to support our decision.

[search for VIN predicated on stop for traffic violation]; *People v Gokey*, 60 NY2d 309 [warrantless search incident to arrest]; *People v Belton*, 55 NY2d 49, *on remand from New York v Belton*, 453 US 454 [automobile exception to warrant requirement]; *People v Elwell*, 50 NY2d 231 [probable cause predicated on informant's tip]; *People v Marsh*, 20 NY2d 98 [search incident to motor vehicle stop]). In addition, we have sought to provide and maintain "bright line" rules to guide the decisions of law enforcement and judicial personnel who must understand and implement our decisions in their day-to-day operations in the field. To this end, we have rejected the reasoning behind the so-called good-faith exception to the warrant requirement recently articulated by the Supreme Court, refusing, on State constitutional grounds, to apply it (*see, People v Bigelow*, 66 NY2d 417, 426-427, *supra* [discussing *United States v Leon*, 468 US 897; *Massachusetts v Sheppard*, 468 US 981]). Similarly, although asked to do so, we have not reached out to adopt the *Gates* "totality of the circumstances" test in warrant cases (*see, id.* at 424-425), and we have declined to extend it to review warrantless arrests predicated on hearsay information (*see, People v Johnson*, 66 NY2d 398, 407, *supra; People v Landy*, 59 NY2d 369, 375).

These decisions reflect a concern that the Fourth Amendment rules governing police conduct have been muddied, and judicial supervision of the warrant process diluted, thus heightening the danger that our citizens' rights against unreasonable police intrusions might be violated. We see the Supreme Court's present ruling as a similar dilution of the requirements of judicial supervision in the warrant process and as a departure from prior law on the subject. As we read the Court's decision, it condones a probable cause determination by a magistrate based only upon the strength of the showing of probable cause as it relates to one of several necessary elements of the crime involved. While the "totality of the circumstances/fair probability" formulation may satisfy some as an acceptable analytical framework when used to

evaluate whether an informant's tip should be credited as *one* element bearing on probable cause, the argument for its validity breaks down where, as here, the standard is applied in a different, non-hearsay, probable cause context. In *Gates*, all available pertinent information known to the police was presented to the magistrate, and brought to bear on the issue of whether the informant's tip was creditable, to establish the elements of a crime (*see*, 462 US 213, 225-227, *supra*). In this case, the Supreme Court's "totality of the circumstances/fair probability" approach sanctioned a determination of probable cause based solely on the police affiant's showing that the films contained numerous sexually explicit scenes and his conclusory assertions that the scenes were representative of the films as a whole (*see, New York v P.J. Video, Inc.*, ____US____, 106 S Ct 1610, 1615-1616, *supra*). According to the Supreme Court, the magistrate's action in issuing the warrant was acceptable because the Court deemed the evidence of explicit, offensive sexual content sufficiently strong to compensate for the officer's failure to submit evidence that the films lacked intrinsic worth and violated community standards.[5]

Several years ago we summarized our past decisions on the subject, restating a rigorous, fact-specific standard of review imposed upon the magistrate determining probable cause.

> "The existence of probable cause is a determination solely for the Magistrate, not the affiant, and should only be made when probable cause has been demonstrated as a matter of fact in the manner prescribed by statute (CPL art 690) and

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[5] Contrary to the contention found in Point II of the dissent (slip opn, pp 12-13), the Supreme Court did rely upon the totality of the circumstances/fair probability standard enunciated for the first time in its recent decision, *Illinois v Gates* (462 US 213). *Gates* was the only decision cited or quoted in the opinion to define the substantive test of probable cause. The Court employed the language of *Gates* to reach a determination that the magistrate was given "more than enough information to conclude that there was a 'fair probability' that the movies satisfied the first and third elements of the statutory definition. . ." (*New York v P.J. Video, Inc.*, ____US____, 106 S Ct 1610, 1616, *supra*).

> decisional law (*see, e.g., People v Marshall,* 13 NY2d 28, *supra; People v Brady,* 16 NY2d 186).
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> Therefore when the Magistrate undertakes this factual determination, ***he should consider all aspects of the information supporting the application.*** Of particular relevancy in this process is an evaluation of the sources of information and the manner in which it was acquired. The Magistrate should also consider the experience and expertise of the officers involved and the extent to which the information has been verified. ***Further attention should be given to the nature of the crime*** and the exigencies, if any, ***involved.*** In sum, the Magistrate must evaluate the search warrant application consistent with these and other considerations which evince reliability.
>
> Where is appears that the Magistrate has conducted such a measured and comprehensive examination into the basis for the warrant, the factual determination as to probable cause will, of itself, constitute a suitable makeweight when the warrant is challenged (*People v Williams,* 20 NY2d 388; *Kerr v California,* 374 US 23). By the same token, where the Magistrate merely acts as a rubber stamp the validity of the warrant will be suspect."

(People v Hanlon, 36 NY2d 549, 559, *supra* [emphasis supplied]). That decision established a clear and definable standard of review. It imposed a specific, non-delegable burden on the magistrate which required that he, not the police, determine probable cause, and it required that his determination be objectively verifiable (*see, Beck v Ohio,* 379 US 89, 98; *cf. United States v Leon,* 468 US 897, *supra; and see generally* 1 W. LaFave, Search and Seizure, § 3.2[b], *supra*). This is the standard that should be applied to protect the rights of New York citizens.

Our decision to rely on Article 1, Section 12, rather than on the Supreme Court's Fourth Amendment pronouncement in this case, is motivated also by concerns of federalism and separation of powers (*cf.* Maltz, *supra,* pp 1016-1023 [discussing institutional factors justifying independent state court review]). The

states exist as sovereign entities independent of the national government and the Tenth Amendment reserves to them and the people "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States" (U.S. Const Amend X). Thus, the "structure of state governments and their sphere of operations simply are not the subjects of the Constitution, except insofar as the Constitution shifts power from the states to the national government, or protects the rights of individuals from government violations" (L. Tribe, American Constitutional Law § 5-20, p 300). One of the powers reserved to the states is the power to define what conduct shall be criminal within its borders. As Justice Marshall noted in his dissent, the determination whether a work is obscene and therefore criminal — or a determination whether probable cause exists to believe a work violates state proscriptions against obscenity — is a "matter of state law and the rightful province of state courts" (*New York v P.J. Video, Inc.*, ____US____, 106 S Ct 1610, 1619, *supra* [Marshall, J., dissenting]). New York courts, pursuant to an express statutory enactment, are bound to construe our Penal Law and its provisions according to the fair import of their terms in order to promote justice and effect the objects of the law (*see,* Penal Law § 5.00; Statutes § 276). We have interpreted this requirement to mean that criminal responsibility cannot be extended beyond the fair scope of the relevant penal statute (*see, People v Gottlieb,* 36 NY2d 629, 632). Additionally, a warrant to search and seize cannot issue absent a magistrate's careful consideration of the elements of the crime involved and a searching review of the facts alleged to support the affiant's belief that *this* crime has been committed (*see, People v Hanlon,* 36 NY2d 549, 559, *supra*). Given that our Legislature, consonant with Federal constitutional mandates (*see, Miller v California,* 413 US 15, *supra*), has determined that an offensive, explicit depiction of sexual conduct, standing alone, is not obscene (*see,* Penal Law § 235.00[1]), neither an issuing magistrate nor a reviewing court can legitimately override that legislative intent and find probable cause

that the crime of obscenity has been committed based solely on a showing that sexually-oriented material is explicit and offensive (*see, People v Heller,* 33 NY2d 314, 332-334, *on remand from Heller v New York,* 413 US 483 [construing former Penal Law § 235.00 in light of *Miller v California,* 413 US 15, *supra*]). The Supreme Court's decision in this case has, in effect, stated that certain elements of our statutory definition of a crime are not significant. We are not free to similarly ignore or recast the legislative mandate.

Finally, it should be noted that obscenity cases differ from other crimes because, by definition, they are predicated on contemporary community standards. While fundamental First Amendment restraints on State power do not vary from community to community, "[p]eople in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity" (*Miller v California,* 413 US 15, 30-34, *supra* [Burger, C.J.]). When viewed as a whole, a challenged work may be a valueless piece of pornography, appealing only to the prurient interests, and the proof before the magistrate may establish this in the view of the reviewing judges. But the work is not criminally obscene unless so judged when applying contemporary community standards. The parameters of the "community" whose standard is to be applied are not only nonnational, but also are to be defined according to state law (*see, People v Heller,* 33 NY2d 314, 323, *supra* [adopting a state-wide community standard for New York, rather than a locality-based one]). Thus, New York law requires the magistrate, or the finder of fact at trial, to determine the average New Yorker's evaluation of, and reaction to, the challenged material (*see, United States v Various Articles of Obscene Merchandise,* 709 F2d 132, 135-136). This perception of "the average New Yorker" involves a mix of factors peculiar to this state, including our legal traditions and our cultural and historical position as a leader in the educational, scientific and artistic life of our country, as well as a recog-

nition that New York is a state where freedom of expression and experimentation has not only been tolerated, but encouraged.

The legal reasoning supporting our views, our understanding of principles of federalism, and this state's legal and cultural traditions all lead us to conclude that we should depart from the federal rule stated in this case. We hold, therefore, that this warrant application did not demonstrate the probable cause required under the provisions of Article 1, Section 12 of the State Constitution and accordingly, on reargument following remand from the United States Supreme Court, we affirm the order of the County Court.

People v. P.J. Video

Case No. 304

HANCOCK, JR., J. (dissenting):

I concur without reservation in much of the articulate and persuasive opinion of Judge Simons. It must be understood that Judge Simons is writing for a unanimous court in his general comments concerning the circumstances when state courts, including our own, should rely on their respective constitutions to accord "greater protection to individual liberties and rights than the protection guaranteed by the Federal Constitution" (Slip Opn, p 7). Certainly, when it appears that some pre-existing right which has been guaranteed under our common law or "the history and traditions of the state" (Slip Opn. p 8) is no longer protected under the Federal Constitution we should not hesitate to rely on our State Constitution.

Thus, in a case involving a warrantless search (*People v Johnson*, 66 NY2d 398) we adhered to our established state constitutional standard based on the two-pronged veracity and basis of knowledge *Aguilar-Spinelli* test and declined to apply the less protective "totality of the circumstances" rule recently formulated by the Supreme Court in *Illinois v Gates* (462 US 213). And in *People v Bigelow* (66 NY2d 417, 426, 427), in holding that the exclusionary rule must be applied to evidence seized pursuant to a warrant issued on less than probable cause, we refused to apply the Supreme Court's recently adopted "good faith exception" to the rule (*United States v Leon*, 468 US 897). Similarly, in People v Class (67 NY2d 433), a decision in which I concurred, we held that our State Constitution provided protection from an unreasonable police intrusion into the interior of an automobile where the Supreme Court has found no protection under the Federal Constitution (*New York v Class*, ____US____, 106 S Ct 960). In each of these cases the differences between the applicable rules under the State and Federal Constitutions were sharply defined.

Each case involved important and fundamental rights and presented considerations[1] which fully explained our decision to reject the new and less protective Federal rule and to adhere to our State Constitution in spite of the acknowledged desirability of promoting uniformity and consistency in the State and Federal rules pertaining to searches and seizures (see, e.g., *People v Johnson*, 66 NY2d 398, 406, 407; *People v Gonzalez*, 62 NY2d 386, 389-390; *People v Ponder*, 54 NY2d 160, 165; *People v Roman*, 53 NY2d 39, 41-42).

Here, the majority's decision to invalidate the search warrant[2] under the State Constitution proceeds on the premise that, as in *Class, Bigelow,* and *Johnson*, it is doing no more than preserving pre-existing rights which have heretofore had protection under New York law but which are no longer protected under the Federal Constitution. It perceives the Supreme Court's present ruling as a "*dilution* of the requirements of judicial supervision in the warrant process and as a *departure from prior law* on the subject" (Slip Opn, p 11, emphasis added). The Supreme Court, the majority concludes, has "extended the reach of this 'totality of the circumstances/fair probability' standard [of *Illinois v Gates*

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[1] In *People v Johnson, supra,* for example, we based our decision to reject the "totality of the circumstances" rule of *Illinois v Gates, supra,* in part, on the need for "predictability and precision in judicial review of search and seizures cases" and for providing " 'bright line' guidance to police personnel in performing their duties." (*People v Johnson,* 66 NY2d 398, 407)

[2] The affidavits upon which the warrant was granted by the issuing magistrate (Supreme Court Justice Theodore S. Kasler) are printed in full as an appendix to the Supreme Court opinion (106 S Ct at pp 1616-1619) and as an appendix to the dissenting opinion to our prior decision (65 NY2d at 585-588). They are summarized at 106 S Ct at p 1616 and at 65 NY2d at p 580. These affidavits describe the contents of what were advertised by defendants as "adult cassette movies" (entitled "Taboo II", "California Valley Girls", "All American Girls", "Taboo", "Debbie Does Dallas"). Each affidavit described consensual acts of deviant sexual intercourse (106 S Ct 1616). It is conceded that "[m]any of the scenes described [in the affidavits] contain explicit sexual activity, patently offensive by any constitutional standard" (*People v P.J. Video,* 65 NY2d 566, 570, 571).

(462 US 213)] and applied it, for the first time to an obscenity case to permit the magistrate to focus generally on the explicit nature of pornographic material without specifically considering the other statutory elements of the crime" (Slip Opn, p 6). The standard that should be applied, the majority states, is what has long been established in New York as the "clear and definable standard of review" — the rule as stated in *People v Hanlon* (36 NY2d 549). It should adhere to this established standard and eschew the newly adopted and less protective rule of the Supreme Court because, among other things, New York law "requires the court to determine the average New Yorker's evaluation of, and reaction to, the challenged material" and such judicial determinations "involve[s] a mix of factors peculiar to this state, including our legal traditions and our cultural and historical position as a leader in the educational, scientific and artistic life of our country, as well as a recognition that New York is a state where freedom of expression and experimentation has not only been tolerated, but encouraged" (Slip Opn, p 16).

If I could accept the majority's major premise — that the Supreme Court in its decision in this case has diluted "the requirements of judicial supervision in the warrant process" and departed "from prior law on the subject" (Slip Opn, p 11) and that New York is merely adhering to the existing level of protection afforded in *People v Hanlon*, *supra* — I would willingly concur in the result. In my opinion, however, the majority's premise does not withstand analysis. On the contrary, as I read the opinion in the light of our earlier decision (*People v P.J. Video*, 65 NY2d 566) and other existing New York precedents, the majority has established a more stringent rule pertaining to what is required for a warrant to seize materials for use as evidence in an obscenity case — a rule which differs from what, until today, has been the law in this state and, I submit, remains the established Federal constitutional law notwithstanding the Supreme Court's decision in *New York v P.J. Video, Inc.* (____U.S.____, 106 S Ct

1610). Because the considerations which clearly called for reliance on our State Constitution to afford protection for the constitutional rights of the defendants in *Class, Bigelow* and *Johnson* are not present here, I must dissent.

I

It has never been suggested that the warrant issued here authorized a seizure of the type which constitutes prior restraint under the First Amendment[3] surmount thus making it necessary to surmount the "higher hurdle in the evaluation of reasonableness" (*Roaden v Kentucky*, 413 US 496, 504) required by the Supreme Court decisions where a prior restraint is involved. Nevertheless, I think it is clear that we are adopting what amounts to the higher standard of evaluation (required for seizures involving prior restraints) although the warrant here was issued only for the seizure of specific videocassettes as evidence. To see whether this conclusion is correct it is necessary to discuss briefly our prior decision in this case and the basis for the Supreme Court's reversal.

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[3] The warrant was issued solely for the purpose of seizing one or two copies of specifically identified videocassettes for use as evidence in the criminal prosecution. Had defendants shown that other copies of these videocassettes were not available, the court would have had the videos copies and immediately returned to defendants pursuant to *Heller v New York* (413 US 483, 492-493). In all, 13 cassettes were seized. This was not a large scale seizure of presumptively protected materials (*compare, e.g., Marcus v Search Warrant,* 367 US 717 involving a warrant authorizing a seizure of materials which in the opinion of police officers were obscene and under which 11,000 copies of 280 publications books and pictures were seized) or the seizure of a film from a movie theater resulting in an abrupt halt of the public's right to see the movie (*compare, e.g., Roaden v Kentucky,* 413 US 596, 504) or a general warrant authorizing a wholesale seizure (*compare e.g., Stanford v Texas,* 379 US 476 involving a warrant authorizing the seizure of unspecified "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings, and other written instruments" under which 2,000 items were seized).

A) In our original decision we rejected the basis upon which Erie County Court had ordered suppression of the videocassettes as evidence — that Supreme Court Justice Kasler acting as magistrate had not personally viewed the cassettes before issuing the warrant. We specifically held that there was no need for the issuing magistrate to "view the film or even a part of it before approving a warrant" (65 NY2d at 571). We affirmed the invalidation of the warrant on an entirely different ground. Citing the Supreme Court's decisions in *Roaden v Kentucky*, 413 US 496; *Marcus v Search Warrant*, 367 US 717, 730-731; *Stanford v Texas*, 379 US 476, 481-485; *Maryland v Macon*, 472 US ____, 125 S Ct 2778, 2780-2782), we found the affidavits insufficient under the standard for review enunciated in those cases. In reversing our order in which we affirmed Erie County Court's holding that the warrant was invalid, the Supreme Court described our reasoning as follows:

> The New York Court of Appeals likewise affirmed, although on a different theory than that of the Justice Court. According to the Court of Appeals, "there is a higher standard for evaluation of a warrant application seeking to seize such things as books and films, as distinguished from one seeking to seize weapons or drugs, for example (*Roaden v Kentucky*, 413 U.S. 496, 504 (93 S. Ct. 2796, 2801, 37 L.Ed. 2d 757)(1973); *Marcus v Search Warrant*, 367 U.S. 717, 730-731 (81 S. Ct. 1708, 1715-16, 6 L.Ed 2d 1127)(1961). In applying the [Fourth] Amendment to such items, the court must act with 'scrupulous exactitude' *Stanford v Texas*, 379 US 476, 481-485 (85 S Ct 506, 509-12, 13 L Ed 2d 431)(1965); *see also, Maryland v Macon*, 472 U.S.____ 105 S.Ct. 2778, 86 L. Ed2d 370 (1985) 65 NY2d at 569-570, 493 S 2d 991, 483 N.E. at 1123 (footnote omitted). Using this "higher" probable cause standard to review the affidavits submitted in support of the warrant application, the Court of Appeals stated:
>
> Many of the scenes described contain explicit sexual activity, patently offensive by any constitutional standard, but the allegations of the affidavits do not indicate whether they

> constitute all, most or a few of the scenes presented in the films . . . The descriptions of the action are not supplemented by references to the narrative or dialogue of the films and the affiant attempted to describe the 'character' or 'theme' of the movies by settings having nothing to do with the plot . . . He made no attempt to reveal the story line (or lack of one) of the films or demonstrate that their 'predominant appeal' was to prurient interest. In short, none of the affidavits permit an inference that the scenes described are more than a catalog of offensive parts of the whole. (*Id.* at 570-571, 493 N.Y. S2d, at 992, 483 N.E. 2d at 1124.)

After pointing out that we had invalidated the warrant under "this [*Roaden v Kentucky*] 'higher' probable cause standard" (106 S Ct at 1613), the Supreme Court reversed our determination on the ground that under the Federal Constitution that higher standard of review is not applicable for the issuance of a warrant not involving a prior restraint where the materials are sought only to be used as evidence. In reversing, the Supreme Court stated:

> The New York Court of Appeals construed our prior decisions in this area [*see, e.g., Roaden v Kentucky, supra and Marcus v Search Warrant, supra*] as standing for the additional proposition that an application for a warrant authorizing the seizure of books or films must be evaluated under a "higher" standard of probable cause than that used in other areas of Fourth Amendment law. But we have never held or said that such a "higher" standard is required by the First Amendment. In *Heller*, we said:
>
> "[S]eizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the *bona fide* purpose of preserving it as evidence in a criminal proceeding, particularly where, as here, there is no showing or pretrial claim that the seizure of the copy prevented continuing exhibition of the film. If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and, following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at

> the request of any interested party, the seizure is constitutionally permissible . . .
>
> "The necessity for a prior judicial determination of probable cause will protect against gross abuses. . . ." 413 US, at 492-493, 93 S Ct, at 2795 (emphasis added: footnotes omitted). (106 S Ct at 1614-1615)

The majority, in its opinion here, does not say specifically that it is now adopting, as a matter of New York constitutional law, the *Roaden v Kentucky* higher standard of review as the standard required for a warrant to seize a limited number of items solely for use as evidence in an obscenity case. Nevertheless, a fair reading of the opinion compels the conclusion that this higher standard is precisely the rule that is being adopted. Nowhere in the opinion does the majority say that this is not so.

B) Whether or not in its opinion the majority is purposefully adopting the higher *Roaden v Kentucky* "prior restraint" standard, one thing seems evident: in its holding that the affidavits are inadequate to support the warrant, the majority is applying the "prior restraint" standard or one very close to it — a standard which is considerably more stringent than what has heretofore been required. An analysis of the majority holding and prior case law supports this conclusion.

The affidavits are insufficient, the majority says, under the established New York standard stated in *People v Hanlon*, (36 NY2d 549, 559) because, while "many of the scenes described contain explicit sexual activity, patently offensive by any constitutional standard" (*People v P.J. Video*, 65 NY2d 566, 570-571), the information provided "relates to [only] one of several necessary elements of the crime involved" (Slip Opn, 11). But more specifically, the majority holds that although the affidavits undoubtedly show that the videos are "patently offensive", they do not establish whether their predominant appeal is to "prurient sex" or whether they "lack serious literary, artistic, political and scientific value" (Slip Opn, p 4). The significant question here is

not whether Investigator Groblewski's affidavits did, in fact, contain sufficient information so that Justice Kasler could reasonably conclude that all three elements of the obscenity definition in Penal Law § 235.00(1) had been satisfied.[4] The real question concerns the quantum and the degree of detail of the information pertaining to each of the three elements of the obscenity definition which the majority now requires and whether in its holding that Investigator Groblewski's affidavits were inadequate on two of the elements the court is creating a new and more stringent New York rule.

Neither the defendants nor the majority cite a Federal decision, a New York decision, or one from another jurisdiction where a court has held a warrant invalid because the warrant application, although sufficient to establish that the materials were patently offensive (Penal Law § 235.00[1][b]), nevertheless, lacked sufficient information so that the magistrate could determine whether the materials appealed to prurient interest in sex (Penal Law § 235.00[1][a]) and lacked serious literary, artistic, political and scientific value (Penal Law § 235.00[1][c]). Cer-

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[4] It would serve no purpose to debate anew (*see, People v P.J. Video*, 65 NY2d 566, 570-571, 580-584) whether the affidavits are sufficiently complete and detailed so that Supreme Court Justice Kasler acting as a neutral and detached magistrate could conclude that the videocassettes were not only patently offensive but also appealed to prurient sex and lacked serious literary or artistic value. Suffice it to say that on this question the Supreme Court has stated:

> Respondents concede that the affidavits describing the five films adequately established probable cause with respect to the second of the three elements of obscenity under the statute, namely, that the movies depicted "in a patently offensive manner" the various kinds of sexual conduct specified in the statute. See N.Y. Penal Law § 235.00(1)(b) (McKinney 1980). Our review of the affidavits convinces us that the issuing justice also was given more than enough information to conclude that there was a "fair probability" that the movies satisfied the first and third elements of the statutory definition, namely, that the "predominant appeal [of the movies] is to the prurient interest in sex," and that the movies "lac[k] serious literary, artistic, political, and scientific value." See N.Y. Penal Law §§ 235.00(1)(a), (c) (McKinney 1980). (106 S Ct at 1616).

tainly, nothing in *People v Potwora* (48 NY2d 91) supports the proposition. In *Potwora*, the sole basis set forth in the affidavits for the issuing magistrate's determination of probable cause was unsupported hearsay — the affiants' statements that the described magazines had been found obscene by city court judges in Rochester and Buffalo. (*Id.* at 93). Nor does *People v Rothenberg* (20 NY2d 35) support the proposition. The warrant in *Rothenberg* was clearly illegal as a general warrant authorizing "a search on appellant's premises for a seizure of 'obscene, indecent and 'hard core pornographic' pictures, photographs and motion picture films' ". (*Id.* at p 38). Similarly, the warrant held invalid in *People v Abronovitz* (31 NY2d 160) was a general warrant which permitted the police "to search for and seize any material which depicted 'scenes of nude persons' and which 'expose the female and male genital organs, the female and male pubic areas" (*Id.* at 163) and under which the police seized "over 1,000 magazines and calendars" (*Id.* at 163). On the other hand, a warrant application for obscene materials has been held valid on affidavits far less detailed and specific than the ones here (*see*, Monserrate v Upper Court Street Book Store, Inc., 49 NY2d 306, 309 involving a warrant application which merely set forth the title of two magazines and a cursory description of an item to be seized; although the court invalidated the seizure of thousands of items not listed in the application, it held valid the seizure of the described items).

The majority's sole authority for the rule it imposes is *People v Hanlon* (36 NY2d 549), the decision it characterizes as establishing "a clear and definable standard of review" (Slip Opn, p 13). But there is nothing in *Hanlon* to support the holding that Supreme Court Justice Kasler did not have enough before him in the affidavits (although concededly sufficient for a finding that the videocassettes were "patently offensive") to exercise his judgment and to come to what necessarily would be an opinion

based on individual perception and taste[5] with respect to the other statutory elements. Nor does *Hanlon* or, for that matter, the majority opinion explain what additional factual information Investigator Groblewski should have supplied, beyond the description of the sexual acts in the affidavits, which would, in some way, have assisted Justice Kasler in reaching his conclusions. Indeed, it is difficult to conceive of any possible additional content that Investigator Groblewski could have supplied which would not have amounted to a meaningless statement of his personal opinion that the films appealed to prurient sex and lacked literary or artistic value. The holding that the warrant application is fatally defective because of the insufficiency of Groblewski's statements on these two elements of the obscenity definition seems directly contrary to the very thrust of the *Hanlon opinion appearing in that portion which the majority does not set forth (Slip Opn, p 13):*

> When considering whether probable cause exists no infallible formula is available; ideally we consider the probabilities as perceived by a reasonable, cautious and prudent police officer and evaluated by an independent magistrate. *However,* in the real world, we are confronted with search warrant applications which are generally not composed by lawyers in the quiet of a law library but rather by law enforcement officers who are acting under stress and often within the context of a volatile situation. Consequently such search warrant applications should not be read in a hypertechnical manner as if they were entries in an essay contest. On the contrary, they must be considered in the clear light of everyday experience and accorded all reasonable inferences. (See, e.g., *United States v Ventresca, supra; Brinegar v United States* 338 US 160, 175.) (36 NY2d at 559; emphasis added).

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[5] The oft-quoted statement of Justice Stewart pertaining to the difficulty in defining pornography in his concurring opinion in *Jacobellis v Ohio* (378 US 184) seems apt here: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it. . ." (*Id.* at 197).

Our court several years ago held that an adversary hearing on the issue of obscenity is not required before a warrant to seize materials for evidence may be issued (*People v Heller,* 29 NY2d 319). In *Heller v New York* (413 US 483)[6], the Supreme Court affirmed this holding of our court and declined to hold that a prior viewing is required (*Id.* at 488). Both the majority and the Supreme Court in this case now agree that a warrant may validly issue without a prior viewing by the magistrate. In adopting a rule which requires the affiant to supply more detailed and descriptive factual material than supplied here by investigator Groblewski so as to satisfy the requirements of subdivisions 1[a] and 1[c] of Penal Law § 235.00 one wonders whether the practical effect will not be to require either a viewing or an obscenity determination before a warrant is issued although neither procedure is presently necessary.

II

An analysis of the Supreme Court's opinion in this case and its opinion of *Illinois v Gates* (462 US 213) simply does not support the proposition that the Supreme Court has diluted "the requirements of judicial supervision in the warrant process" (Slip Opn, p 11) by adopting what it refers to as the "totality of the circumstances/fair probability" formulation of *Illinois v Gates.*

It is significant that, although the majority refers repeatedly to

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[6] Under *Heller v New York* (413 US 483) defendants had an absolute right to demand "a prompt judicial determination of the obscenity issue in an adversary proceeding". It is significant that they did not do so. Neither did they challenge the accuracy of Investigator Groblewski's descriptions of the video cassettes or his sworn statements that "content and character" of each of the video cassettes was as set forth in the description of the various sexual acts which followed. Had defendants chosen to challenge Investigator Groblewski's statements, they could have availed themselves of the hearing procedure for doing so (*see, Franks v Delaware,* 438 US 154). They did not.

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what seems to have become a "buzzword" — the phrase "totality of the circumstances" — that phrase never appears in the Supreme Court opinion (*New York v P.J. Video,* ____US____, S Ct 1610). The reason for this, I believe, is obvious. As the majority itself notes, (Slip Opn, p 5) the *Illinois v Gates* decision applied to a totally dissimilar type of warrant application — one based on hearsay information supplied to the affiant by an informant. The holding in *Illinois v Gates* was simply that the rigid "two-pronged test" under *Aguilar* and *Spinelli* for determining whether an informant's tip establishes probable cause for issuance of a warrant was abandoned and replaced by the more flexible "totality of the circumstances" test. The phrase "totality of the circumstances" as describing the method of judging the sufficiency of information supplied in a warrant application has meaning only in the context of an application based on hearsay information from an informant — and even then it has meaning only as an alternative to what was, before the decision in *Illinois v Gates,* the strict two-pronged "veracity" and "reliability" test of *Aguilar* and *Spinelli.*

Here, the application is on personal knowledge of Investigator Groblewski who saw the films himself. There is no informant. The question before us relates solely to the adequacy of Investigator Groblewski's description of what he saw. "Totality of the circumstances" is meaningless in this context. Nothing in the Supreme Court's reference to *Illinois v Gates* suggests that the court was applying anything other than its established rule for assessing the adequacy of an application for a warrant[7] to seize materi-

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[7] That the Supreme Court's reference in its opinion here to *Illinois v Gates* was not for any purpose pertaining to the so-called "totality of the circumstances" rule but merely for the purpose of restating the established general rule for probable cause appears clearly from the following:

> We believe that the analysis and conclusion expressed by the dissenting judge are completely consistent with our statement in *Gates* that "probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." 462 U.S., at 244, n. 13, 103 S. Ct., at 2335, n. 13. (____US____, 106 S Ct at 1616)

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als as evidence in an obscenity case where the seizure will not result in a "prior restraint" (*see, Heller v New York*, 413 US 853).

III

My differences with my colleagues come to this. I believe that in holding that this warrant application is insufficient we are creating a new and more stringent standard under New York constitutional law for testing applications for a warrant to seize evidence in obscenity cases where prior restraint is not involved. I heartily agree that there are cases where we should, as the highest court in this State, apply our State Constitution to protect important and basic rights which are not afforded protection under the Federal Constitution. In my opinion, however, this is not such a case. Thus, with full respect for the contrary views of my colleagues, I am compelled to disagree.

★ ★ ★

On reargument, following remand from the United States Supreme Court, order affirmed. Opinion by Judge Simons in which Chief Judge Wachtler and Judges Meyer, Kaye, Alexander and Titone concur. Judge Hancock dissents and votes to reverse in an opinion.

Decided October 28, 1986

86-1072

Supreme Court, U.S.
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No. 86-1072

In The

Supreme Court of the United States

OCTOBER TERM, 1986

NEW YORK,

Petitioner,

vs.

P. J. VIDEO, INC. d/b/a NETWORK VIDEO and JAMES ERHARDT,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

1. Does this Court have jurisdiction to grant the Petition for a Writ of Certiorari?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ARTICLE I, SECTION 12

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that

evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof.

28 U.S.C. § 1257

Final judgments or decrees rendered by the highest court of a State in which a decision would be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

REASON FOR DENYING CERTIORARI

THE UNITED STATES SUPREME COURT DOES NOT HAVE JURISDICTION TO REVIEW THE OPINION OF THE NEW YORK COURT OF APPEALS

The Petition for Certiorari filed by the District Attorney of Erie County must be denied because of the lack of jurisdictional basis for review. The jurisdictional statute cited by petitioner, 28 U.S.C. §1257(3), permits review by writ of certiorari only where:

> "the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

(See also, Article III of the United States Constitution).

Because petitioner seeks review of a state court judgment assessing individual rights and liberties under the State Constitution and Penal Laws, no federal question is implicated and the jurisdictional requisites of §1257(3) are not satisfied. This Court stated in *Herb v. Pitcairn*, 324 U.S. 117, 65 S.Ct. 459 (1945):

> "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge *federal* rights. And our power is to correct wrong judgments, not to revise opinions" (*Id.* at 125-126, 65 S.Ct. 463, emphasis supplied).

Without doubt, there is no federal right or question to be reviewed. Explaining its task on remand from this Court, the New York Court of Appeals said that the question before it was "whether Article I, Section 12 of the State Constitution imposes a more exacting standard for the issuance of search warrants autho-

rizing the seizure of allegedly obscene material than does the Federal Constitution (*People v. P.J. Video*, 65 NY2d 566, 575, *reversed and remanded, New York v. P.J. Video, Inc.*, ____U.S.____, 106 SCt 1610). We hold that it does and we therefore affirm the order of County Court suppressing the films" (B-1-B-2).[1]

It is the separation of powers between the federal and state branches of government which precludes this Court from reviewing a decision of the New York Court of Appeals resting entirely upon the State Constitution and state statutes. That grant of sovereignty was addressed by the Court of Appeals in its review upon remand:

> "The states exist as sovereign entities independent of the national government and the Tenth Amendment reserves to them and the people '[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States' (U.S. Const Amend X). Thus, the 'structure of state governments and their sphere of operations simply are not the subjects of the Constitution, except insofar as the Constitution shifts power from the states to the national government, or protects the rights of individuals from government violations' (L. Tribe, *American Constitutional Law*, § 5-20, p. 300)" (B-11-B-12).

Given that division of power, state court judgments on state rights are immune from federal review. As explained by Justice Brennan in "State Constitutions and the Protection of Individual Rights," 90 Harv.L.Rev. 489, 501 (January, 1977):

> "And, of course, state courts that rest their decisions wholly or even partly on state law need not apply federal principles of standing and justiciability that deny litigants access to the courts. Moreover, the state decisions not only cannot be overturned by, they indeed are not even reviewable by, the

[1] Numbers in parentheses refer to pages in the Appendix to the Petition for Certiorari.

> Supreme Court of the United States. We are utterly without jurisdiction to review such state decisions."

The same limitation is expressed in the leading handbook on Supreme Court practice: "If, in fact, the judgment [of the state court] rests on a state ground the Supreme Court has no jurisdiction to review the case." Stern, R., Gressman, E. and Shapiro, S., *Supreme Court Practice*, p. 168 (6th Ed. 1986).

These authorities, reiterating verities which have been maintained since the inception of this country's judicial system are now, incredibly, ignored by the District Attorney. Indeed, petitioner, a highly placed representative of the state itself, appears to seek the overthrow of state sovereignty when, in rather menacing manner, he announces that the opinion of the Court of Appeals was not rendered in accordance with this Court's opinion and that it should be instructed "to comply with the mandate to consider this case in a manner not inconsistent with the Supreme Court's determination" (p. 5 of Petition for Certiorari). Most assuredly, the Court of Appeals, in relying on the State Constitution and statutes to affirm its earlier judgment, did render an opinion consistent with the decision of the Supreme Court. In exercising its authority to expand rights and liberties under the State Constitution beyond the minimum protections guaranteed by the United States Constitution (*see, Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81, 100 S.Ct. 2035, 2040 [1980]), the Court gave due deference both to the sovereignty of the Supreme Court and the power reserved to it as arbiter of state rights. For the District Attorney to suggest that this Court's mandate incorporated a suggestion that New York should not exercise its independence is irre-

sponsible, invoking a spectre of totalitarianism totally foreign to the democracy that is ours.[2]

The petitioner's attempt to bypass the jurisdictional requirement, by arguing that the Court of Appeals decision was fostered by a flawed construction of this Court's opinion, is, quite simply, without merit. The Supreme Court will not review a state court ruling which rests on adequate and independent state grounds, even if a federal question is also involved. The reason for such abstention is explained in *Herb v. Pitcairn, supra:*

> "It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion" (*Herb v. Pitcairn, supra,* at 125-126, 65 S.Ct. 459).

In this explanation lies the practical problem underlying petitioner's suggestion that the Supreme Court should attempt to make its opinion more palatable to the Court of Appeals. Even assuming such further exposition was necessary or desirable, the

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[2] The cases cited by petitioner are inapposite to the argument he would construct. In *Oregon v. Mathiason,* 429 U.S. 492, 97 S.Ct. 711 (1977), certiorari was granted to clarify interpretation of the federal *Miranda* rule. *Schlude v. C.I.R.,* 372 U.S. 128, 83 S.Ct. 601 (1963), involved a federal question only, the definition of "income" under the federal income tax. Likewise, *Wilkinson v. United States,* 365 U.S. 399, 81 S.Ct. 567 (1961), concerned the breadth of power of the House Committee on un-American activities and its subcommittees. *McCandless v. Furlaud,* 296 U.S. 140, 56 S.Ct. 41 (1935), also involved federal, not state, issues of law. Thus, that in these cases the Supreme Court clarified earlier rulings is immaterial: the clarification was directed to resolution of federal rights and privileges, not state matters.

Supreme Court's opinion, should the Court of Appeals again decline to reverse itself, would be advisory only.

And, should any question remain, this Court's own definition of "adequate and independent" state grounds obviates any argument that the decision does not rest upon discrete state concerns but rather on an unwarranted interpretation of federal law. The Supreme Court noted, in the *P.J. Video* decision itself, that a state court decision unalterably rests upon adequate and independent state grounds if there is a "plain statement" by the state court that its decision hinges on state law (A-5). The Court of Appeals, on remand, issued that plain statement, in language that could not be any more precise. Its holding was as follows: "We hold, therefore, that this warrant application did not demonstrate the probable cause required under the provisions of Article I, Section 12 of the State Constitution. . ." (B-14).

Even apart from that plain statement which precludes acceptance of jurisdiction, it is otherwise evident that the New York Court of Appeals, with or without any further explication of the federal standard of probable cause, will not accept the affidavits in question as adequate foundation for a determination of probable cause of obscenity under New York Penal Law, Section 235.00. The decision represents more than a rejection of the "fair probability" standard. More essentially, it contains the assertion that the concerns of New York State in preservation of the fundamental rights of free expression and freedom from unlawful governmental intrusion are somewhat different from and broader than those of the federal government. Not only did the Court of Appeals state that it wished to strictly interpret judicial supervision of the warrant process (B-9), demanding a "rigorous, fact-specific standard of review imposed upon the magistrate" (B-10); it also noted that traditionally, New York has been a leader in the artistic and cultural life of the country (B-13), as well as a state "where freedom of expression and experimentation has not only

been tolerated, but encouraged" (B-14). Given that any obscenity case involves the consideration of contemporary community standards, to be defined according to state law[3], the Magistrate's responsibility to weigh the perceptions of the average New Yorker in and of itself led the Court of Appeals to review the probable cause determination in *People v. P.J. Video* more broadly than did the United States Supreme Court (*see*, B-13-B-14). Its right to do so is firmly etched in the concept of the separation of powers. Thus, the Court of Appeals noted:

> "One of the powers reserved to the states is the power to define what conduct shall be criminal within its borders. As Justice Marshall noted in his dissent, the determination whether a work is obscene and therefore criminal — or a determination whether probable cause exists to believe a work violates state proscriptions against obscenity — is a 'matter of state law and the rightful province of state courts.' " (B-12).

In this statement, if in no other, lies the reason why jurisdiction is foreclosed. New York has determined and explicitly stated that the affidavits in this case are not satisfactory as a matter of state law.

There, the matter must rest.

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[3] *People v. Heller*, 33 N.Y.2d 314, 323, adopts a statewide community standard for New York, rather than a locality based one.

CONCLUSION

For this reason, the Petition for Writ of Certiorari should be denied.

DATED: Buffalo, New York
January 15, 1987

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